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No. 93-300

In The

Supreme Court of the United States

October Term, 1993

SOUTHWEST WATER WELLS, INC.,

Petitioner,

vs.

GARNEY COMPANIES, INC.,
WAUGH/GARNEY JOINT VENTURE
AND AMERICAN HOME ASSURANCE COMPANY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issue framed by petitioner is more accurately and succinctly stated as follows:

> Whether federal *forum non conveniens* law is to be applied by a federal court in a diversity action.

RULE 29.1 STATEMENT

No parent or subsidiary company for respondents Garney Companies, Inc. or Waugh/Garney Joint Venture is to be listed under Supreme Court Rule 29. American Home Assurance Company is a member company of American International Group, Inc.

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OTHER AUTHORITIES

15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828 (2d ed. 1986) 3

ADDITIONAL STATEMENT OF CASE

While petitioner's statement of the case including the factual background and procedural background is accurate, petitioner fails to set forth the additional facts set forth below which provide a true and accurate back-drop to this case.

A. Factual Background

The controversy arose out of a construction project which Waugh/Garney Joint Venture ("Joint Venture") had contracted with the Bahamian government to perform in the Bahamas. (Pet. A. 13). The subcontract between petitioner and the Joint Venture states that the law of the Bahamas would govern any dispute. (Pet. A. 16). Further, petitioner and the Joint Venture are already parties in a lawsuit in the Bahamas involving the same set of facts and issues involved in this lawsuit. (Pet. A. 16).

B. Procedural Background

The Joint Venture filed a Motion to Dismiss petitioner's complaint based upon grounds of *forum non conveniens,* and because of petitioner's failure to join an indispensable party – The Commonwealth of the Bahamas Water and Sewerage Corporation, the owner. (Pet. A. 12). The District Court dismissed on the basis of *forum non conveniens* (Pet. A. 12) and thus did not reach the indispensable party issue. The failure to join an indispensable party may also prevent petitioner from proceeding in the United States. The Eleventh Circuit affirmed

the District Court's decision in a per curiam decision. (Pet. A. 9).

SUMMARY OF ARGUMENT

Petitioner alleges a conflict between circuits which does not exist. The case it cites in conflict, *Weiss v. Routh*, 149 F.2d 193 (2d Cir. 1945), did not decide whether federal law applied under the doctrine of *forum non conveniens* in a diversity case. As a result, *Weiss* does not conflict with the First, Fifth and Eleventh Circuits which have decided this issue uniformly.

The Eleventh Circuit case on the issue, *Sibaja v. Dow Chemical*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985), is consistent with the Supreme Court cases cited by petitioner. The Supreme Court cases deal with service of process and statute of limitations. *Hanna v. Plumer*, 380 U.S. 460 (1965) (allowing service of process pursuant to the federal rules in a diversity action); *Guaranty Trust v. York*, 326 U.S. 99 (1945) (finding that a state statute of limitations was substantive thus requiring the federal court to use the state rule in a diversity case). Neither case involves application of the law of *forum non conveniens*. In resolving the *forum non conveniens* question, *Sibaja* cited and correctly applied both the *Hanna* and *Guaranty* decisions.

The three circuits deciding the issue have uniformly applied federal *forum non conveniens* law in diversity cases and this is not a matter of extreme importance

requiring the Court's attention. The leading commentators on practice and procedure – Wright & Miller, endorse this principle and state that *Sibaja* was a "good" decision.

REASONS FOR DENYING THE WRIT

I. THE CONFLICT BETWEEN CIRCUIT DECISIONS ALLEGED BY PETITIONER DOES NOT EXIST

Petitioner alleges that the decisions in *Sibaja v. Dow Chemical*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) and *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated sub nom., Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989) conflict with the 1945 Second Circuit decision in *Weiss v. Routh*, 149 F.2d 193 (2d Cir. 1945).

Sibaja, 757 F.2d at 1219 and *In re Air Crash Disaster*, 821 F.2d at 1159 held that the interests of the federal forum in self-regulation, in administrative independence and in self-management require applying federal *forum non conveniens* law in diversity cases. Although petitioner claims *Weiss* conflicts with these decisions, the Second Circuit in *Weiss* did not address whether federal *forum non conveniens* law is to be applied by a federal court in diversity cases. Instead, *Weiss* decided whether a federal court in New York could apply New York law to resolve a dispute concerning the internal affairs of a Virginia corporation. The case dealt only with whether Virginia or New York law would apply, not with any conflict between federal and state law. The Second Circuit held that the New York court was an improper forum to

decide a dispute concerning the internal affairs of a Virginia corporation. The court stated nothing about the applicability of state versus federal law of *forum non conveniens* in a diversity case. *Weiss*, therefore, does not conflict with the *Sibaja* and *In re Air Crash Disaster* decisions.

Petitioner also does not cite the Second Circuit decision which does discuss whether state or federal *forum non conveniens* law applies in a diversity case. In *Schertenleib v. Traum*, 589 F.2d 1156, 1162 n.13 (2d Cir. 1978), the court stated that the issue was undecided in the Second Circuit and further noted that a decision was not necessary because New York state law and federal law were the same. This is a further indication that the "conflict" alleged by petitioner regarding *forum non conveniens* law was not present in *Weiss*.

Thus, there is no conflict on this precise issue between the circuits. All circuit courts that have decided the issue (First, Fifth and Eleventh) are uniform in their decisions that federal law rules govern the *forum non conveniens* analysis in a diversity case. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1068 n.11 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991); *Royal Bed & Spring Co. v. Famossul Industria*, 906 F.2d 45, 50 (1st Cir. 1990); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir. 1987), *vacated sub nom., Pam Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *Sibaja v. Dow Chemical*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

II. THE ELEVENTH CIRCUIT DECISION IN *SIBAJA* DOES NOT CONFLICT WITH THE SUPREME COURT'S *HANNA* DECISION

Petitioner attempts to portray a conflict between the Eleventh Circuit decision in *Sibaja* and the Supreme Court decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). No such conflict exists.

Hanna involved whether the service of process of an executor was governed by federal or state law in a diversity action. The Supreme Court held that service of process pursuant to federal rules did not violate *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and further held that the federal rules applied to the adequacy of service in a diversity case. This case had nothing to do with the application of the *forum non conveniens* doctrine, except to provide further support for the principle that matters pertaining to the administration of federal courts are controlled by federal law.

Petitioner also cites *Guaranty Trust v. York*, 326 U.S. 99 (1945). *Guaranty* did not involve the application of the *forum non conveniens* doctrine. The Supreme Court in *Guaranty* held that the state statute of limitations was a rule of decision that a federal court must apply in a diversity case. The doctrine of *forum non conveniens*, however, "is a rule of venue, not a rule of decision." *Royal Bed & Spring Co.*, 906 F.2d at 50 (citing *Sibaja*, 757 F.2d at 1219). Because the doctrine operates as a procedural rule rather than a state substantive rule of law, application of federal law does not violate *Erie*.

The *Sibaja* decision does not conflict with the holdings in either Supreme Court decision cited by petitioner.

In fact, *Sibaja* cited both *Hanna* and *Guaranty* and followed the principles set forth in those decisions. *Sibaja*, 757 F.2d at 1219.

III. THIS QUESTION IS NOT A MATTER OF EXCEPTIONAL IMPORTANCE REQUIRING THE COURT'S ATTENTION

The per curiam opinion by the Eleventh Circuit in this case is consistent with all circuit decisions to have addressed the issue. *See Nolan, Royal Bed & Spring Co., In re Air Crash Disaster* and *Sibaja*. Furthermore, Wright & Miller, the leading commentators on practice and procedure, endorse the holding in *Sibaja* that federal law controls. 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3828 at 194 (2d ed. 1986). They state that "it seems quite clear" that federal courts are not bound by state *forum non conveniens* law because "these are matters of the administration of the federal courts, not rules of decision, so that state rules cannot be controlling." *Id.* Because the issue has been clearly decided and there are no conflicting decisions, this is obviously not a matter of extreme importance requiring the Court's attention.

This Court denied *certiorari* on the identical issue in both *Sibaja v. Dow Chemical*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) and *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991). All circuits to address the issue – the Eleventh Circuit in *Sibaja*, the Fifth Circuit in *In re Air Crash Disaster* and *Nolan*, and the First Circuit in *Royal Bed & Spring*

Co. – have decided the issue consistently. All these circuits hold that federal law should be applied in addressing *forum non conveniens* questions in diversity cases.

Petitioner finally asserts that this case presents an exceptionally important question because of a Florida constitutional issue. Petitioner apparently maintains that the Florida constitutional provision that its courts "shall be open to every person" creates an absolute right to gain redress in the courts. Petitioner cites no Florida Supreme Court or federal court decision that has ever found this provision to affect the *forum non conveniens* analysis. The Florida Constitution clearly does not give an unfettered right to its courts as it cannot prevent removal and does not affect the administration of federal courts as set forth in *Sibaja*, 757 F.2d at 1215. Respondent respectfully submits that this constitutional claim is a non-issue and not an exceptionally important issue requiring the Court's attention. Furthermore, the court in *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 978 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), keenly observed that a United States citizen who chooses to engage in international transactions should know that when foreign operations lead to litigation, it cannot always expect to bring suit in the United States when the site of litigation should be elsewhere.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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